VADIVELOO MUNUSAMY

v.

GENERAL TYRE RETREADERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[ORIGINATING MOTION NO: R1-25-36-97]
25 SEPTEMBER 1998

LABOUR LAW: *Employment - Dismissal - Sick leave supported by medical certificate - Allegation that medical certificate obtained falsely - Doctor not called to testify - Whether past medical record irrelevant so long as covered by medical certificates - Failure to consider relevant matters - Whether dismissal with just cause or excuse*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus - Judicial review - Industrial Court award - Whether Industrial Court had committed an error of law - Principles applicable*

This was an application for an order of *certiorari* to quash a decision of the Industrial Court and for an order of mandamus directing another division of the Industrial Court to rehear the dispute.

The applicant was suspended with half pay in connection with certain charges alleged against him including obtaining medical/Socso leave through false pretences, malingering and seeking medical treatment at Klang General Hospital without prior permission. Pursuant to the findings of a domestic inquiry, the applicant was found guilty of these charges and thus he was dismissed for gross misconduct and indiscipline. The applicant filed a representation under s. 20 of the Industrial Relations Act 1967 for reinstatement to his position with the respondent but the Industrial Court found for the respondent.

Before the Industrial Court, the applicant claimed that the charges were frivolous and vexatious and that the inquiry was in breach of the rules of natural justice. He further claimed that the dismissal was shrouded in bad faith as the respondent sought to victimise and discriminate against him for being a union leader.

The Industrial Court opined that the medical certificate was issued reluctantly and that the doctor doubted the applicant's complaint of a backache. In coming to this conclusion, the Industrial Court relied on the testimony of one of the respondent's witnesses based on a telephone conversation he supposedly had with the doctor. The Industrial Court also concluded that the applicant had

insisted for a reference to the General Hospital to supplement his excessive medical leave by Socso leave although there was no evidence to show that it was the applicant who had insisted for a reference. Further, the learned chairman of the Industrial Court took into account the applicant's past medical record although there were medical certificates covering such leave. Before the Industrial Court, there was evidence that the applicant had sustained a back injury as a result of helping a fellow employee to lift certain items. This evidence, however, was not considered despite there being no evidence to the contrary.

Held:

[1] The proceedings before this court was not one of appeal but one of judicial review to see whether the Industrial Court had committed an error of law that affects its jurisdiction in coming to the decision in the impugned award. Even in an appeal, the appellate courts seldom encroach on the realm of the finding of facts by the subordinate court except where such findings are perverse or against the weight of the evidence. In the judicial review, the decision making process of an inferior tribunal is being scrutinised. However, if in the process of making a decision, the decision-maker makes a decision which is unreasonable in the sense that no reasonable tribunal similarly circumstanced would have arrived at, then he had acted beyond his jurisdiction and certiorari would lie.

[2] Sick leave supported by a medical certificate is recognised by s. 60F of the Employment Act 1955. If the employer is not happy with the valid certificate tendered, the evidence of the doctor who issued such a certificate is very relevant. The testimony of the witness about what the doctor told him over the telephone is hearsay and should not have been admitted.

[3] The applicant's past medical record is irrelevant in the light of the fact that his absence from work during the relevant period was properly covered by the medical certificates issued by competent authorities.

[4] To act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form does not permit the Industrial Court to go on a frolic of its own in making a decision even against the available evidence before it or on no evidence at all.

[5] Much delay would be caused in referring the matter back to the Industrial Court for a rehearing. On the evidence, the court is satisfied that the dismissal of the applicant was without just cause or excuse. In the

circumstances, the court remits the matter back to the Industrial Court only to determine whether the applicant ought to be reinstated and if not, to assess the appropriate compensation in lieu thereof.

[Application allowed with costs.]

Cases referred to:

General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy [1996] 1 ILR 147 ***(refd)***

General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy [1996] 2 ILR 1419 ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(refd)***

Mui Bank Bhd Johor v. Tee Puat Kuay [1993] 4 CLJ 69 ***(foll)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union [1995] 2 CLJ 748 ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 ***(refd)***

Legislation referred to:

Employment Act 1955, s. 60F

Industrial Relations Act 1967, ss. 20(3), 30(5)

For the applicant - Rajeswari Karupiah; M/s Murugavell Arumugam & Co

For the respondent - Jacqueline Ann Christie; M/s Ng Yook Woon, Andrew TC Saw & Co

Reported by Cindy Chan

JUDGMENT

Abdul Kadir Sulaiman J:

This is an application for an order of *certiorari* to quash the decision of the Industrial Court Award No. 532 of 1996 dated 13 November 1996, and for an order of mandamus directing another division of the Industrial Court to rehear the dispute between the parties.

The applicant, the worksite secretary of the National Union of Employees in Companies Manufacturing Rubber Products, was employed by the respondent on 16 June 1976 as a production worker earning a salary of RM919. From 16 November 1993 he was suspended from his work with half pay until 22 November 1993 in connection with four alleged charges as follows:

(1) Obtaining medical/Socso leave through false pretence on 8 November 1993;

(2) After failing to obtain medical leave from the company doctor, on 10 November 1993 insisted that he be referred to the Klang General Hospital;

(3) Seen committing malingering at the D & C Bank, Section 16, Shah Alam on 11 November 1993 at 2.30pm whilst on medical leave;

(4) Failing to adhere to the procedure for medical treatment by seeking medical attention on 12 November 1993 at the Klang General Hospital without prior permission;

which are acts of gross misconduct and indiscipline and if found guilty are liable to disciplinary action as stipulated in art. 39 of the Collective Agreement. A domestic inquiry was held on 27 November 1993. On 8 December 1993 the applicant was informed that he was found guilty on the first, third and fourth charges and was dismissed summarily. Being dissatisfied with the action of the respondent, the applicant filed a representation under s. 20 of the Industrial Relations Act 1967 (hereinafter referred to as "the 1967 Act") for reinstatement to his position with the respondent. Acting under s. 20(3) of the 1967 Act the representation was referred by the Minister to the Industrial Court for an award.

In the Industrial Court, the applicant filed his statement of case. According to the statement of case, the charges were frivolous and vexatious. The inquiry conducted was in breach of the rules of natural justice. The dismissal was shrouded in bad faith as the respondent sought to victimise and discriminate him as a Union leader in view of the fact that the 3rd Collective Agreement was in dispute between the Union and the respondent. The respondent filed its statement in reply denying all the allegations of the applicant contained in the statement of case. At the commencement of the hearing before the Industrial Court certain preliminary issues were raised by the applicant concerning the matters contained in the statement in reply of the respondent. The Industrial Court by Award No. 33 of 1996 handed down on 25 January 1996 disallowed the objections.

The matter of the representation was then fixed for hearing. Both parties filed with the court respective affidavits forming the evidence in chief of their respective witnesses in the hearing. For the applicant three affidavits were filed, all affirmed on 7 November 1995 by him and two other co-workers respectively identifying various acts of the respondent before his dismissal to indicate victimization on the part of the Respondent upon him and other members of the Union over their union activities, and also the narrative refuting the allegations in the charges leveled against him by the respondent. For the respondent, also three affidavits were filed. A formal hearing was later held before the Industrial Court in relation to the representation of the applicant. At the end of it the court on 13 November 1996 handed down the impugned Award No. 532 of 1996 dismissing the applicant's representation holding that the dismissal of the applicant by the respondent was with just cause or excuse.

The applicant by this application now seeks for orders that the impugned Award be quashed and to order the remission of the matter back to the Industrial Court for a rehearing before another division of it. The impugned award is exhibited as "V-14".

In this case of the applicant, there was no dispute as to the fact of dismissal of him by the respondent. The reason for the dismissal is also clear to all parties. So, what concerns the Industrial Court in a matter such as this is whether upon the reason given by the respondent for the dismissal, it constitutes just cause or excuse or otherwise. *In Goon Kwee Phoy v. J & P. Coats (M) Bhd.* [1981] 2 MLJ 129 Raja Azlan Shah CJ (Malaya) said at p. 136:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.

In *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. and Another Appeal* [1995] 2 MLJ 753 Mohd. Azmi FCJ said at p. 765:

> Indeed, the Minister's reference should be viewed as a hearing de novo by an independent statutory tribunal.

The independent statutory tribunal referred to here is none other than the Industrial Court. The proceedings before the Industrial Court through the process of referring the representations to it by the Minister under s. 20(3) of the 1967 Act commenced by the filing in court and the exchange of the pleadings between the parties, in this case between the applicant and the respondent. For the applicant the pleading is the statement of case and for the respondent, the statement in reply. *Inter alia*, the applicant avers that he was wrongfully dismissed from employment by the respondent on 8 December 1993. The dismissal letter is dated 8 December 1993 from the respondent to the applicant which states as follows:

> We refer to the inquiry held on 27/11/93, on the allegations levelled against you as per our letter dated 15/11/93.
>
> The management has deliberated on and carefully gone through the records of the inquiry, the connected papers and documents. We concur with its findings that from the evidence adduced at the inquiry the charges no (1), (3) and (4) levelled against you have been sufficiently proved.
>
> As such and in view of the seriousness of the offences, the management has no recourse but to terminate your service effective from the date of this letter.

The letter of 15 November 1993 mentioned in the letter of dismissal is one from the respondent to the applicant which states as follows:

> Please be informed that you have been suspended from work with effect from 16/11/93 until 22/11/93 at half pay only.
>
> The charges against you are as follows:

1) That on 8/11/93 you have obtained medical/socso leave through false pretence;

2) That on 10/11/93 after failing to obtain medical leave from the company doctor, you insisted that you be refer to the Klang General Hospital;

3) That on 11/11/93 at 2.30 pm you were seen committing malingering at the D & C Bank, Section 16, Shah Alam, whilst on medical leave;

4) That on 12/11/93 you have failed to adhere to the procedure for medical treatment by seeking medical attention at the Klang General Hospital without prior permission.

The above are acts of gross misconduct and indiscipline and if found guilty are liable to disciplinary action as stipulated in Article 39 of the Collective Agreement.

Please present yourself for an enquiry in the factory conference room on 23/11/93 at 10.15 am. If you are absent, the enquiry will proceed and the decision of the Chairman of the enquiry will be final.

Thus the reason for the inquiry carried out by the respondent is to establish acts of gross misconduct and indiscipline as alleged against the applicant. The four charges mentioned therein forms the evidence to support such allegation against the applicant. But the applicant by his pleading avers that this dismissal was shrouded in bad faith on ground of victimisation and discrimination for him being a union leader. In the circumstances, the function of the Industrial Court in such a dispute is to resolve the issues raised. As to the first contention, it is for the respondent to satisfy the court that the dismissal was for gross misconduct and indiscipline in order to justify the dismissal. As to the second, the burden is on the applicant to satisfy the court that the dismissal was on the ground of bad faith. At the end of the day the court by its award must make a decision one way or another in order to resolve the dispute. In doing so, it was on the exercise of fact finding through the evidence of witnesses for each side. In this particular case, having heard the evidence, the court found for the respondent.

The proceedings before me now is not one of an appeal against the decision of the learned chairman of the Industrial Court but one of judicial review to see whether the court has committed an error of law that affects its jurisdiction in coming to the decision in the impugned Award. Even in the case of an appeal, the appellate courts seldom encroach on the realm of the finding of facts by the subordinate court except where such findings are perverse or against the weight of the evidence. In the judicial review, the decision making process of an inferior tribunal is being scrutinised. However, if in the process of making a decision, the decision-maker makes a decision which is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at, then he had acted beyond his jurisdiction and certiorari would lie: see *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 MLJ 317 CA. This decision in the aforesaid case has been confirmed by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1995] 3 MLJ 369 where at p. 390 Gopal Sri Ram JCA, delivering the judgment of the court said:

> In *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union*, the Court of Appeal correctly recognized that *Anisminic* had done away with the distinction between errors of law that go to jurisdiction and errors that do not.

In the instant case, the Industrial Court after hearing the evidence from both sides said the following at p. 15 of the impugned award:

> After careful evaluation of the facts and circumstances in the present case this court comes to the finding that medical leave obtained by the Claimant from November 8, 1993, was obtained in order not to perform his duties. Such an act amounts to misconduct and the Company had acted reasonably in dismissing the Claimant. The dismissal is, therefore fair and with just cause.

The thrust of the learned Chairman's decision can be seen from what he says in the award beginning from p. 13. While recognising that an employee is entitled to sick leave after being examined by a doctor appointed by the employer, he found that in this case the applicant had abused the purpose of the sick certificates he obtained to cover the period 8 November 1993 to 12 November 1993. He said that the panel doctor appointed by the respondent had doubts of the applicant's complaint of backache but nevertheless gave him medical leave on the benefit of doubt. He also said that the applicant insisted on a reference to the General Hospital to supplement his excessive medical leave by Socso leave. I think he fell into error when he said so in the light of the evidence before him. He relied on the hearsay evidence of the respondent's witness, COW1, without hearing the evidence of the panel doctor in coming to such conclusion. The medical leave taken by the applicant for the relevant period was properly covered by medical certificates issued by the panel doctor and the doctor from the General Hospital. The medical certificates were not suspect for the learned chairman continues:

> The Company is not disputing the doctor's competence nor is the Company challenging the doctor's professionalism. What the Company is contending is that the Claimant at the material time induced the procurement of medical leave by misleading the doctor as to the cause of his alleged backache. The Company, in fact, conceded that employees do fall sick and are entitled to medical leave. It is the Claimant's *modus operandi* in obtaining medical leave that is under scrutiny and suspicion.

Short of calling the doctor by the respondent to testify on the issue, the contention of the respondent remains a conjecture and for that the applicant should not be made to suffer. This fact concerning sick leave supported by a medical certificate is recognised by s. 60F of the Employment Act 1955. If the employer is not happy with the valid certificate tendered, the evidence of the doctor who issued such a certificate is very relevant. But in this case the doctor was not called to testify. It is understandable because the respondent does not question the validity of the certificate. What the witness told the court of what the doctor told him over the telephone is hearsay and should not have been admissible as evidence against the applicant. In this case, there is the evidence of the applicant himself that he had been suffering from backache for a long time and this fact is within the knowledge

of the respondent. There was no challenge over this piece of evidence by the applicant. There was also no evidence before the learned chairman that it was the applicant who insisted upon the panel doctor to have him referred to the General Hospital for further treatment. On this aspect of the findings of the learned chairman he had indeed committed a serious error of law.

The learned chairman also made a finding with regard to the applicant having suffered a backache for helping his colleague to lift heavy tyres on 8 November 1993 when he said in the award:

> He had admitted it was not his duty to lift heavy tyres but put up the queer story he was helping a fellow employee and sustained the back injury.

According to the evidence this fellow employee was CLW3 who gave evidence for the applicant. It is not in dispute that lifting of heavy tyres was not the normal duty of the applicant. But from the evidence, on that day he was called to assist CLW3 because the person to do so was not around. But this aspect of the evidence of CLW3 was not at all considered by the learned chairman. On the other hand, there was no affirmative evidence before him that on that day the applicant did not do that type of work at all. Here again the learned chairman had fallen into error in not considering relevant matters before him in arriving at the decision.

In making the finding against the applicant as he did, the learned chairman took into account the applicant's past medical record which should be considered as irrelevant in the light of the fact that the applicant's absence from work during the relevant period was properly covered by the medical certificates issued by competent authorities. The learned chairman was overly concerned about the applicant's having exhausted all his normal medical leave entitlement and now resorting to leave under the Socso. In any event there was no suspicion over the applicant's normal sick leave taken. In the circumstances, the learned chairman also has fallen into error by taking irrelevant matters into consideration in arriving at his decision which is now being challenged before this court. In *Mui Bank Bhd. Johor v. Tee Puat Kuay* [1993] 3 MLJ 239 the learned judge said at p. 245:

> Where the applicant is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the respondent. Mere suspicion, as in this case, therefore could not be accepted as sufficient ground for dismissal.

In the light of the various serious errors of law committed by the learned chairman, s. 30(5) cannot help to save the impugned award. To act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form does not permit the Industrial Court to go on a frolic of its own in making a decision even against the available evidence before it or on no evidence at all. In the circumstances, for the reasons given earlier, the application of the applicant is allowed and the impugned award is quashed. Much delay had been caused in the disposal of the matter in the dispute and in the circumstances,

much more delay would be caused in referring back the matter to the Industrial Court for a rehearing. On the evidence before the learned chairman relating to this impugned award, I am satisfied that the dismissal of the applicant was without just cause and excuse. In the circumstances, on the principle of *R. Rama Chandran v. Industrial Court of Malaysia & Anor*. [1997] 1 MLJ 145, I remit the matter back to the Industrial Court only to determine whether the applicant ought to be reinstated in his former employment with the respondent and if not, to assess appropriate compensation in lieu to be paid to him, and also to award whatever back-wages, allowances and other benefits due to him on account of the wrongful dismissal. Costs to the applicant.